Lembaga Tabung Angkatan Tentera v Kidamai Sdn Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO S2-22-239 OF 1998
KAMALANATHAN RATNAM J
28 AUGUST 1998

Civil Procedure *— Stay of proceedings — Application for — Dispute as to quantum payable — Whether dispute ought to be referred to arbitration — Whether fact that party was unrepresented gave cause to dispute — Arbitration Act 1952 s 6*

The parties had entered into a sale and purchase agreement ('the sale and purchase agreement') for the purchase of a piece of land ('the land'). The parties later terminated the sale and purchase agreement and entered into a supplemental agreement ('the supplemental agreement') where the defendant agreed to refund the purchase price paid by the plaintiff together with the agreed damages amounting to RM17.2m ('the agreed damages'). The plaintiff contended that pursuant to the supplemental agreement, there is a balance of RM9,579,757.03 ('the balance sum') due and owing to the plaintiff and filed a suit claiming the amount. The defendant applied that all proceedings be stayed pursuant to s 6 of the Arbitration Act 1952 ('the Act').

The defendant disputed the payment of agreed damages as provided in the supplemental agreement as at the time of the signing of the agreement it was not represented by solicitors. The defendant also contended that by virtue of cl 14(d)(ii)(bb) of the sale and purchase agreement, the agreed damages payable, in the even the sale and purchase agreement was terminated, was 10% of the purchase price. Since there arose a dispute on the quantum payable, the defendant contends that the matter ought to be referred to arbitration.

Held, dismissing the application with costs:

(1) The parties had pursuant to the supplemental agreement put an end to the applicability of cl 14(d)(ii)(bb). Since the sale and purchase agreement has been superseded by the supplemental agreement, the defendant could not now rely on any clause in the sale and purchase agreement (see p 404H).

(2) There was no dispute arising out of this case. The defendant had given no workings or calculations or evidence as to why the agreed sum of the balance sum was in dispute. He merely stated he was disputing that figure after initially agreeing to it (see p 405C).

(3) The issue whether the defendant was properly advised because it was unrepresented was not a factor giving cause to a dispute (see p 405E).

A [**Bahasa Malaysia summary**

Pihak-pihak telah mengikat suatu perjanjian jual beli ('perjanjian jual beli tersebut') untuk membeli sebidang tanah ('tanah tersebut'). Pihak-pihak kemudiannya telah menamatkan perjanjian jual beli tersebut dan mengikat perjanjian tambahan ('perjanjian tambahan B tersebut') yang mana defendan bersetuju mengembalikan harga belian yang dibayar oleh plaintif bersama dengan ganti rugi yang disetujui sebanyak RM17.2 juta ('ganti rugi yang disetujui'). Plaintif menghujahkan bahawa menurut perjanjian tambahan tersebut, terdapat baki sebanyak RM9,579,757.03 ('baki jumlah') yang harus dibayar dan terhutang kepada plaintif dan memfailkan guaman C menuntut amaun tersebut. Defendan memohon supaya semua prosiding digantung menurut s 6 Akta Timbangtara 1952.

Defendan mempertikaikan bayaran ganti rugi yang disetujui seperti yang diperuntukkan dalam perjanjian tambahan tersebut kerana pada masa menandatangani perjanjian tersebut ia tidak diwakili oleh D peguamcara. Defendan juga menghujahkan bahawa disebabkan fasal 14(d)(ii)(bb) perjanjian jual beli, ganti rugi yang disetujui yang harus dibayar, sekiranya perjanjian jual beli ditamatkan, adalah 10% daripada harga belian. Oleh kerana pertikaian telah timbul atas kuantum yang harus dibayar, defendan menghujahkan bahawa perkara itu haruslah dirujuk kepada timbangtara. E

Diputuskan, menolak permohonan dengan kos:

(1) Menurut perjanjian tambahan pihak-pihak telah menamatkan pemakaian fasal 14(d)(ii)(bb). Oleh kerana perjanjian jual beli telah digantikan dengan perjanjian tambahan tersebut, defendan F kini tidak boleh bergantung pada sebarang fasal dalam perjanjian jual beli (lihat ms 404H).

(2) Tiada pertikaian yang timbul daripada kes ini. Defendan tidak memberikan apa-apa penghitungan atau pengiraan atau keterangan mengenai mengapakah jumlah yang disetujui atas G baki jumlah dipertikaikan. Ia cuma menyatakan bahawa ia mempertikaikan angka itu selepas menyetujui angka itu pada mulanya (lihat ms 405C).

(3) Isu mengenai sama ada defendan telah dinasihati sewajarnya kerana ia tidak diwakili bukanlah suatu faktor yang H membangkitkan pertikaian (lihat ms 405E).]

Notes

For cases on application for stay of proceedings, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 4274–4275. I

Cases referred to

Elf Petroleum SE Asia Pte Ltd v Winelf Petroleum Sdn Bhd [1986] 1 MLJ 177 (refd)

London and North Western Railway Co v Jones [1915] 2 KB 35 (refd)
Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy [1995] 1 MLJ 817 (refd)
Tan Kok Cheng & Sons Realty Co Sdn Bhd v Lim Ah Pat (t/a Juta Bena) [1995] 3 MLJ 273 (refd)

Legislation referred to

Arbitration Act 1952 s 6

Joseph Yeo (*Joseph Yeo*) for the applicant/defendant.
Jayanthi Pillay (*Kadir Tan & Ramli*) for the respondent/plaintiff.

Cur Adv Vult

Facts

By a sale and purchase agreement dated 16 July 1993, the plaintiff agreed to purchase and the defendant agreed to sell Sub-Lot Nos 5, 6, 7 and 8 comprising of 1,163,800 square feet of land in Taman Perindustrian Kidamai ('the said land') which said land was being developed by the defendant. The plaintiff had indeed paid a sum of RM11,654,819.30 to the defendant towards account of the total purchase price which was RM13,383,700.

The relevant clause in the said agreement required the defendant to deliver vacant possession of the said land to the plaintiff by a certain date. Since the defendant was unable to do so in spite of extension of time having been given by the plaintiff, the parties then entered into a supplemental agreement on 12 May 1997 to terminate the earlier sale and purchase agreement dated 16 July 1993 and the defendant agreed to refund the purchase price paid by the plaintiff together with the agreed damages amounting to RM17.2m in accordance with the terms and condition of the supplemental agreement.

Clause 6 of the supplemental agreement provides for 'any dispute, controversies or differences which may arise with regard to the terms and conditions of this agreement' to be referred to arbitration.

The plaintiff contended that pursuant to the said supplemental agreement there is a balance of RM9,579,757.03 due and owing to the plaintiff and filed a suit claiming the said amount.

The defendant's case

This is the defendant's application that all proceedings herein be stayed pursuant to s 6 of the Arbitration Act 1952 ('the Act'). The defendant contended in the affidavit in support that it disputed the provision of cl 2 of the supplemental agreement which provided for the payment of agreed damages of RM17.2m to the plaintiff. Its basis is that at the time of the

signing of the agreement it was not represented by solicitors and that it was not informed by the plaintiff to retain solicitors or to seek independent legal advice. The defendant also contended that by virtue of cl 14(d)(ii)(bb) of the sale and purchase agreement, the agreed damages payable, in the event the said agreement was terminated, was 10% of the purchase price. Since there arose a dispute on the quantum payable, the defendant contends that the matter ought to be referred to arbitration. The defendant also contended that the plaintiff was required to show by evidence and proof the damages sustained by it before any damage became payable to it and this was required to be determined by arbitration. By way of notice, the defendant requested the plaintiff to refer the matter to arbitration but there had been no response. The defendant concluded that it was ready and willing to do all things that are necessary to refer the dispute to arbitration.

Case for the plaintiff

In objecting to this application, the plaintiff contended that by signing the supplemental agreement the defendant ought not to question the validity of the amount of damages payable amounting to RM17.2m. The plaintiff referred to exh KTR-1 annexed to its affidavit in reply which was a letter from the plaintiff to the defendant dated 10 October 1997 demanding payment of the exact balance sum of RM9,197,318.67 and stating that the failure to remit the said sum 'will be a breach of the supplemental agreement'. In response to this, the defendant wrote a letter to the plaintiff dated 11 October 1997 seeking an 'extension of 90 days for the full settlement of the outstanding amount due'.

Court's findings

Section 6 of the Act reads as follows:

> If any party to an arbitration agreement or any person claiming through or under him commences any legal proceedings against any other party to the arbitration, or any person claiming through or under him, in respect of any matter agreed to be referred to arbitration, any party to the legal proceedings may, before taking any other steps in the proceedings, apply to the court to stay the proceedings, and the court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement, and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

In *Tan Kok Cheng & Sons Realty Co Sdn Bhd v Lim Ah Pat (t/a Juta Bena)* [1995] 3 MLJ 273, the Federal Court held that under s 6 of the Act there is no requirement that the dispute has to be bona fide for the court to exercise its discretion to order a stay. Any dispute or difference would suffice, as the court is not required to critically examine the merits of the claim. It went on to hold that a court may be justified in refusing a stay in plain and obvious cases, where a reasonable tribunal, without undertaking

a meticulous examination of the merits, is bound to hold that the issues raised by a defendant are frivolous or vexatious. Where there is an agreement to arbitrate and the conditions set out in s 6 of the Act are satisfied, a court should favour the grant of a stay. The court's residual discretion to refuse a stay is limited to cases involving fraud, or where there is no dispute that falls within the arbitration clause or where the third party procedure will be resorted to.

Is there a dispute within s 6 of the Act?

The defendant referred to cl 14(d)(ii)(bb) of the sale and purchase agreement. This clause reads:

> In the event that the non-registration of the transfer is due to an encumbrance owing to the blameworthy conduct on the part of the vendor and the vendor failing to remove such encumbrance within the aforesaid period of two (2) months mentioned in sub-cl (i) above the purchaser shall be entitled at its option — ...
>
> (bb) by notice in writing served on the vendor to terminate this agreement whereupon the vendor shall within thirty (30) days from the date of termination of this agreement and against the re-delivery by the purchaser of all the documents delivered hereunder by the vendor to the purchaser and subject to the purchaser redelivering or causing to redeliver vacant possession of the plots to the vendor refund to the purchaser or the purchaser's financier as the case may be all monies (including the deposit) then paid by the purchaser to the vendor pursuant to this agreement together with a further sum representing ten percent (10%) of the purchase price by way of agreed liquidated damages for the vendor's breach of this agreement.

It is obvious that this clause would come into play if there is non-registration of the transfer due to an encumbrance due to the blameworthy conduct on the part of the defendant. In such a situation, the plaintiff as purchaser is required to re-deliver to the defendant all the documents delivered to the plaintiff and upon redelivering vacant possession of the said land, the defendant is required to return all monies so far paid together with 10% of the purchase price as agreed liquidated damages.

In this case, the parties had pursuant to the supplemental agreement put an end to the applicability of that clause. The original sale and purchase agreement is no longer in existence. It has been superseded by this supplemental agreement. In fact, this is also the defendant's case because the arbitration clause is found in the supplemental agreement. The defendant cannot now rely on any clause in the sale and purchase agreement. That door is shut to it.

The next question in dispute is that it is not liable to pay and that it is also disputing the amount. Mr Jospeh Yeo referred me to *Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy* [1995] 1 MLJ 817 wherein the Court held that even though a sum has been agreed as liquidated damages, a party is entitled only to so much of the damages as it is able to prove. Whilst I accept this decision of the Federal Court and am bound by it,

I am of the view that the defendant herein cannot rely on this case to take this matter from this court, to arbitration.

When the plaintiff wrote a demand letter dated 10 October 1997 for the exact sum of RM9,197,318.67, the defendant, who had the right to demand that the said case be remitted for arbitration on the basis that he was disputing the right to payment or to the amount, instead sought time by requesting for an extension of the period of repayment by three months and agreed to fully settle the outstanding sum by that extended time. To my mind, there is no dispute arising out of this case. The defendant has given no workings or calculations or evidence as to why the agreed sum of RM9,197,318.67 is in dispute. He merely states he is disputing that figure after initially agreeing to the said figure. In *London and North Western Railway Co v Jones* [1915] 2 KB 35 at p 38, the court held that it does not, however, follow that the courts cannot be resorted to without previous recourse to arbitration to enforce a claim which is not disputed but which the trader merely persists in not paying. In *Elf Petroleum SE Asia Pte Ltd v Winelf Petroleum Sdn Bhd* [1986] 1 MLJ 177, the court held that where a claim is admitted, it does not call for a settlement by arbitration. It is my view that where a claim is admitted or is indisputable, the court before which the case is, is in a better position to render speedier justice rather than delaying the matter by referring it to arbitration and thus incurring further expenses.

As to whether the defendant was properly advised because it was unrepresented is not a factor giving cause to a dispute. It was the defendant's own folly in not seeking legal representation before signing the supplemental agreement. In the absence of any evidence or even suggestion of coercion and/or undue influence, this submission is totally unacceptable.

Having considered all the facts, I have no hesitation in dismissing this application with costs.

Application dismissed with costs.

Reported by Loo Lai Mee